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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MICHAEL AND KATHERINE QUERARD,
Plaintiffs and Appellants,
v.
COUNTRYWIDE HOME LOANS, INC.,
Defendant and Respondent.

A124262

(Marin County
Super. Ct. No. CIV 071590)

Plaintiffs Michael and Katherine Querard appeal from a judgment dismissing their amended complaint against defendant Countrywide Home Loans, Inc. and Countrywide Bank, N.A. (Countrywide). The pleading focuses on two distinct transactions: plaintiffs' purchase in January 2005 of a costly home in Tiburon, financed by two loans from Countrywide, in connection with which deeds of trust were altered without plaintiffs' knowledge; and the failure of Countrywide to refinance the home a year later as it had allegedly agreed to do. Plaintiffs contend that the court erred in sustaining without leave to amend Countrywide's general demurrers to their causes of action seeking to set aside the trustee's sale and cancel the trustee's deed that was issued when Countrywide subsequently purchased the property at a foreclosure sale, and to their causes of action for breach of contract and fraud based on the failure to refinance. We shall affirm the dismissal of the causes of action challenging the foreclosure, but reverse the rulings with respect to the breach of contract and fraud claims.

Factual and Procedural History

According to the allegations of their first and second amended complaints, in January 2005, the Querards purchased their home as "husband and wife, as community property with right of survivorship." In connection with the purchase, Michael executed an adjustable rate note in favor of Countrywide in the principal amount of $1 million, secured by a deed of trust on the property. In addition, Michael entered into a home equity line of credit with Countrywide that was secured by a second deed of trust against the property in the maximum principal amount of $1.64 million. Michael advised Countrywide that "although title to the property was to be held in the names of Michael and Katherine husband and wife as community property with the right of survivorship, that only Michael was applying for a loan through Countrywide and that only Michael would provide a first and second deed of trust to Countrywide."

On January 5, Michael signed the loan documents and the deeds of trust for both loans. The documents defined the borrower as "Michael Querard, a married man as his sole and separate property." Katherine was not named as a borrower and did not sign the loan documents. However, Katherine did sign and initial the deeds of trust. She was told at the time that her signature was required to "acknowledge that Michael was encumbering his [half] interest in the property."

On January 6, unbeknownst to the Querards, "Countrywide issued instructions to California Land Title [of Marin (hereinafter CLT)] to alter the definition of 'borrower' on the [deeds of trust] so that borrower would include the name of Katherine Querard." CLT altered the deeds to read: "Michael Querard, ~~a married man as his sole and separate property~~, and Katherine Querard, husband and wife as community property with right of survivorship." The Querards did not learn of the alterations until March 2007.

In late 2005, plaintiffs sought to refinance the property with Countrywide. In September 2005, the property was appraised for $4 million. In October 2005, a second appraisal confirmed the $4 million value. In February 2006, after Countrywide's automated property valuation system listed the value of the property at $4.5 million, a

third appraisal was requested by Countrywide. The subsequent March 2006 appraisal again valued the property at $4 million.

Michael was seeking a loan of 80 percent of the appraised $4 million value. At the time, Michael was working as a full-time real estate investor and he and Katherine owned investment property in Marin and Napa Counties. The Querards "realized that due to the softening market in late 2005, [they] would need to raise additional capital to cover the costs of servicing and completing their real estate projects and presenting them into the market at a reasonably advantageous time." Countrywide was aware of their need to generate additional capital for this purpose. In addition, Countrywide knew that there were two additional loans secured by the property and that the Querards would need $3.054 million to pay off the existing four loans.

On March 10, 2006, Stacy Jackson, a loan agent for Countrywide, sent Michael an email specifying the terms of the loans, including the principal amount, type of loan, applicable interest rate information, prepayment penalty and the amount of the initial monthly payments. On March 13, Jackson informed Michael by email that the underwriting department had approved his loan request and that a payment of $100 would "lock-in" the loans. Michael paid the $100. On April 8, Jackson sent Michael an email notifying him that the loans had been "approved with a .50 discount point add on ($11,000 cost)" and confirming that the first loan amount is $2.2 million and second loan amount is $1 million. The email indicated that the closing documents should be drawn up by the following Monday afternoon.

On April 13, Countrywide informed Michael that the closing would be delayed because it wanted to obtain a fourth appraisal. The fourth appraisal valued the property at $3.5 million. Countrywide informed the Querards that as a result of the latest appraisal, it would loan them only $2.8 million. In May, the appraisal was adjusted so that the property was valued at $3.75 million, allowing for a loan against the property in the amount of $3 million.

The Querards did not complete the transaction with Countrywide because the revised loan amounts were insufficient to meet their financial needs. While the loan

application was still being processed, the Querards "began to experience difficulty meeting the payments on [their] additional real estate as well as the monthly payments on the first or second loans with Countrywide." At that time, Michael discussed his concerns with Countrywide and was assured that "any delinquent payments would simply be paid off through the refinancing proceeds" and that his deficient loans "would not be reported to credit agencies because they would be rolled into the refinanced amounts." When the refinance loans did not close, "Countrywide reported [the Querards'] late payments to the credit reporting agencies which repeatedly decreased [their] credit scores, which prevented [them] from accomplishing a refinancing with any other lender."

On June 23, 2006, Countrywide recorded a notice of default and election to sell under the second deed of trust. On September 26, Countrywide recorded a notice of default and election to sell under the first deed of trust. A trustee's sale was conducted on January 4, 2007, under the second deed of trust and Countrywide purchased the property by credit bid in the amount of $1.3 million.

On April 5, 2007, plaintiffs filed a complaint against Countrywide[1] alleging causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, unfair competition, negligent and intentional misrepresentation, unjust enrichment, promise without intent to perform, declaratory relief, to set aside a trustee's sale, to cancel the trustee's deed, to quiet title and for an accounting. Countrywide filed a demurrer, which was sustained with leave to amend as to all causes of action.

Plaintiffs filed a first amended complaint which eliminated the causes of action to quiet title and for an accounting. Countrywide again demurred. The court sustained the demurrer without leave to amend as to the fraud related claims (negligent and intentional

[1] The original and first amended complaints also named as defendants Recon Trust Company, Mortgage Electronic Registration System, Inc. and Merrill Lynch Realty, Inc. These parties were not named in the second amended complaint which, however, added as defendants CLT and Karen Di Basilio and Janice M. Aurelio, two of its agents. The present appeal concerns only the disposition of the claims against Countrywide.

misrepresentation, unjust enrichment, promise without intent to perform), the claim for declaratory relief, and the causes of action to set aside the trustee's sale and cancel the trustee's deed. The court sustained the demurrer with leave to amend as to the contract claims (breach of contract, breach of the implied covenant of good faith and fair dealing and promissory estoppel) and the claim for unfair competition.

Plaintiffs filed a second amended complaint re-alleging their contract claims and claim for unfair competition. Countrywide once again filed a demurrer, which the trial court sustained without leave to amend. The trial court entered a judgment of dismissal as to Countrywide and the Querards filed a timely notice of appeal.

Discussion

1. *Standing*

Countrywide contends that the Querards lack standing to pursue this appeal because the "potential claim to recover [the] foreclosed house" was listed as an asset in the Querards' voluntary bankruptcy proceeding. Thus, they argue that the bankruptcy trustee has the sole authority to prosecute this action. Under federal bankruptcy law, "a chapter 7 debtor may not prosecute on his or her own a cause of action belonging to the bankruptcy estate unless the claim has been abandoned by the trustee." (*Bostanian v. Liberty Savings Bank* (1997) 52 Cal.App.4th 1075, 1081.)

Filings in the bankruptcy proceedings, of which we take judicial notice, [2] establish that the claim at issue was abandoned by the trustee. As Countrywide asserts, the potential claim to recover the home was listed as an asset in the bankruptcy proceedings. On May 2, 2007, the trustee filed a no-asset report. " 'A no-asset report is tantamount to an abandonment of the trustee's interest in the property.' [Citation.] 'The general rule in this area is well settled-once a trustee abandons property, the abandonment is irrevocable.' [Citations.] If property has been abandoned, title to the property reverts back to the debtor as if it had never been held by the trustee. [Citation.] 'Thus, the trustee

[2] The parties' requests for judicial notice of filings in the bankruptcy proceedings are granted.

is divested of control of the property because the property is no longer part of the bankruptcy estate.' " (*Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc*. (1994) 29 Cal.App.4th 1828, 1842-1843.) Accordingly, the claim to recover the house reverted to the Querards, giving them standing to pursue this action.

2. Demurrer

"On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, we assume the truth of all facts properly pleaded in order to determine whether the complaint states a cause of action. [Citations.] Application of the law to the facts as pleaded is subject to our independent review." (*Schiavon v. Arnaudo Brothers* (2000) 84 Cal.App.4th 374, 378.)

A. Claims to Set Aside the Trustee Sale

The tenth and eleventh causes of action of the first amended complaint alleged that the trustee's sale should be set aside and the trustee's deed cancelled in part because the sale was based on forged deeds of trust. The complaint also alleges that the Querards "are ready, willing and able to tender those sums, if any, that the Court finds due and owing . . . ."

Countrywide's demurrer was sustained on the ground that the Querards failed to allege that "they have made a valid and viable tender of payment of the indebtedness owing, which tender is essential to cancel a voidable sale under a deed of trust." As the trial court noted, "A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust." (*Karlsen v. American Sav. & Loan Assn*. (1971) 15 Cal.App.3d 112, 117.) "This requirement is based on the theory that one who is relying upon equity in overcoming a voidable sale must show that he is able to perform his obligations under the contract so that equity will not have been employed for an idle purpose." (*Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 878.) In *Dimock*, the court recognized, however, that where the trust deed is void rather than merely voidable, the party attacking the deed is "not required to meet any of the burdens imposed when, as a matter of equity, a party wishes to set aside a voidable deed. [Citation.] In particular, [that party is] not required to tender any of the

amounts due under the note." (*Ibid*.; see also 4 Miller & Starr, Cal. Real Estate (3d ed. 2000) Deeds of Trust, § 10:212, p. 686 [while tender is "a condition precedent to an action by the trustor to set aside the trustee's sale on grounds that the sale is voidable, . . . [¶] . . . [w]hen the sale is totally void, a tender usually is not required"].)

Plaintiffs argue that because the second deed of trust was void, rather than merely voidable, as a result of the forgeries, they were not required to tender payment as a condition precedent to setting the sale aside. They rely on authority that notes broadly that "a forged document is void *ab initio* and constitutes a nullity." (*Wutzke v. Bill Reid Painting Service, Inc.* (1984) 151 Cal.App.3d 36, 43.) The allegations of the first amended complaint, however, do not support the claim that the second deed of trust is void due to the alleged forgery.

"Any material alteration of a writing with intent to defraud any one, so as to make the writing appear to be different from what it was originally intended to be, is a forgery." (*Union Tool Co. v. Farmers' etc. Nat. Bk.* (1923) 192 Cal. 40, 52; see also Pen. Code, § 470, subd. (c) ["Every person who, with the intent to defraud, alters . . . any record of any . . . conveyance, or other instrument, the record of which is by law evidence . . . is guilty of forgery"].) However, an alteration of a writing that changes "the terms and tenor of an existing instrument" is a forgery only if the alteration is material. (18A Cal.Jur.3d (2010) Criminal Law: Crimes Against Property, § 402.) "The materiality of a change in the contract is not based on whether a party that did not consent to the change will be benefited or injured by the alteration. Rather, materiality is determined by whether the alteration modifies the meaning or legal effect of the contract. [¶] . . . When an alteration is not material . . . there is no effect on the enforceability of the document even though there is no new consideration for the alteration." (1 Miller & Starr, Cal. Real Estate, *supra*, Deeds of Trust, § 1:97, p. 333; see, e.g., *Consolidated Loan Co. v. Harman* (1957) 150 Cal.App.2d 488; *Laskey v. Bew* (1913) 22 Cal.App. 393.)

The modification that Countrywide allegedly directed CLT to make to the deeds of trust had no legal effect on the foreclosure proceedings or on plaintiffs' loss of equity in their home. Assuming, as plaintiffs allege, that Michael assumed the loans as his separate

obligation and that the original deeds of trust reflected that only he was the borrower, Countrywide nonetheless was entitled to foreclose on the deeds of trust and enforce its security interest against the entire property. (Fam. Code, § 910 ["the community estate is liable for a debt incurred by either spouse . . . during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt"]; *Lezine v. Security Pacific Fin. Services, Inc.* (1996) 14 Cal.4th 56, 64.) Because the alleged forgery is not material, it did not affect the enforceability of the deeds. Hence, plaintiffs at most had a claim to set aside the foreclosure sale on equitable grounds. Thus, the trial court properly concluded that the tender requirement applied and that the tenth and eleventh causes of action of the first amended complaint failed to state claims because no tender was alleged.

B. *Declaratory Relief*

The Querards' seventh cause of action of the first amended complaint for declaratory relief sought "a declaration that the trustee's deed is invalid and of no effect; that the trustee's deed is set aside; that the plaintiffs are entitled to reinstate their prior loans; and that the refinancing agreement is enforceable." In sustaining the demurrer to this cause of action, the court cited *Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 364, and explained, "Causes of action seeking to set aside the trustee's sale (10th), and to cancel the trustee's deed (11th), have already accrued. These causes of action are equal to or more effective than the claim for declaratory relief." Plaintiffs acknowledge that there is some overlap between their cause of action for declaratory relief and the tenth and eleventh causes of action, but argue that it was premature to conclude that the declaratory relief cause of action was not proper. They argue that if they were to prevail on their claims to set aside the trustee's sale and cancel the trustee's deed, "the resulting orders . . . would only put in place two pieces of the puzzle; they would not by themselves conclusively determine each side's rights with respect to the other and the property, and the extent to which the other causes of action might fill in the gaps remains to be seen at this early pleading stage."

Code of Civil Procedure section 1060 provides: "Any person interested . . . under a contract . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action . . . in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction . . . arising under such . . . contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. . . ." The broad scope of Code of Civil Procedure section 1060 is limited by section 1061 which states: "The court may refuse to exercise the power granted . . . in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."

"The discretion to refuse to entertain an action in declaratory relief vested in the trial court by section 1061 is not unlimited. It may be exercised only when there is a basis in fact for the conclusion that the declaration is not necessary or proper. [Citations.] . . . [¶] Any doubt should be resolved in favor of granting declaratory relief. [Citation.] While the court may refuse to entertain the action where 'the rights of the complaining party have crystallized into a cause of action for past wrongs, [and] all relationship between the parties has ceased to exist . . .' [citation], it may not exclude the action where the alternative remedy of suing upon the matured breach is not as 'speedy and adequate or as well suited to the plaintiff's needs as declaratory relief.' [Citations.] A lawsuit for breach of contract is neither as speedy and adequate nor as well suited as declaratory relief to the plaintiff's needs where, despite the breach, a relationship between the parties continues so that a declaration may guide their future conduct [citations], or where the use of declaratory relief will avoid a multiplicity of suits that may ensue if a different remedy is pursued." (*Warren v. Kaiser Foundation Health Plan, Inc*. (1975) 47 Cal.App.3d 678, 683-684.)

Given the trial court's determination here, which we have just confirmed, that the tenth and eleventh causes of action fail to state claims on which relief can be granted, there is nothing further to be decided with respect to the validity of the deeds of trust or

of the trustee's deed. Any issues with respect to the enforceability of the alleged refinance agreement can be fully analyzed within the context of the breach of contract and fraud claims. Since plaintiffs no longer own the property that was to be security for the loans they claim Countrywide was committed to make (and Countrywide itself may no longer own the property), the only relief available to them at this point is damages, for which these other causes of action are sufficient. Hence, the trial court did not abuse its discretion in sustaining the demurrer to the declaratory relief cause of action without leave to amend.

C. *Contract Claims*

The first cause of action of the second amended complaint asserts a claim for breach of Countrywide's alleged agreement to refinance plaintiffs' home with loans of $2.2 million and $1 million. The second and third causes of action allege claims for breach of the implied covenant of good faith and fair dealing and promissory estoppel. In sustaining Countrywide's demurrer to these causes of action without leave to amend, the court relied on two distinct grounds, that (1) the Querards "have failed to allege facts to support a showing the parties either expressly or impliedly agreed to transact the refinance loan application electronically through email communications pursuant to the Uniform Electronics Transactions Act, [Civil Code section 1633.1 et al. (UETA)]" and (2) Jackson's email to the Querards is not an enforceable commitment to loan "because it does not contain all the essential terms of a refinance agreement" including "the terms for repayment, late payment, default, and enforcement of the note." We conclude that neither ground withstands scrutiny.

With respect to the first ground on which the trial court relied, the parties devote significant attention to whether they agreed to conduct the loan transaction electronically, so that the email confirmation on which plaintiffs rely serves as a writing confirming the agreement. (Civ. Code, § 1633.5, subd. (b).) This issue is important, however, only if the loan commitment was not enforceable unless entered in writing. (See Civ. Code, § 1633.7, subd. (c) ["If a law requires a record to be in writing, an electronic record [that meets the requirements of the UETA] satisfies the law"].) Because the complaint alleges

that the asserted agreement to refinance was in writing, the parties and the trial court seem to have assumed that the alleged agreement was required to satisfy the statute of frauds. Since the pleading alleges that Countrywide's approval of the agreement was evidenced by email messages, on the assumption that the statute of frauds applies it was necessary to determine if the emails constituted a writing under the UETA. However, if Countrywide's alleged refinancing commitment need not have been in writing in order to be enforceable, it does not matter whether the requirements of the UETA were satisfied. Despite the fact that the complaint alleges a written agreement, the initial question is whether the alleged agreement was *required* to have been made in writing.

Under the statute of frauds, Civil Code section 1624, subdivision (a), "The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent: [¶] . . . [¶] (6) An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust upon the property purchased, unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property. [¶] (7) A contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than one hundred thousand dollars ($100,000), not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit. For purposes of this section, a contract, promise, undertaking or commitment to loan money secured solely by residential property consisting of one to four dwelling units shall be deemed to be for personal, family, or household purposes." Thus, while an agreement by a purchaser of real property to pay an indebtedness that is secured by a deed of trust ordinarily must be in writing under subdivision (a)(6), a commitment to loan money that will be secured by residential property is not required to be in writing. (*Landes Constr. Co., v. Royal Bank of Canada* (9th Cir. 1987) 833 F.2d 1365, 1370 ["An oral agreement to lend money with which to purchase real property clearly falls outside California's statute of frauds. [Citations.] But an oral agreement to grant a lien against real property as security for a debt is within the statute"].) Since the alleged agreement

here need not have been in writing, it is of no consequence whether the parties agreed to use emails to confirm their understanding. If Countrywide made an otherwise enforceable commitment to refinance plaintiffs' home, the agreement is binding whether made orally or by email.

We thus turn to whether the complaint alleges the existence of an enforceable loan commitment. "Letters of commitment, for which a fee is paid, constitute an option to the applicant to obtain the loan at the specified terms. [Citations.] Under the usual principles of lender liability, '[a] loan commitment is not binding on the lender unless it contains all of the material terms of the loan, and either the lender's obligation is unconditional or the stated conditions have been satisfied. When the commitment does not contain all of the essential terms . . . the prospective borrower cannot rely reasonably on the commitment, and the lender is not liable for either a breach of the contract or promissory estoppel.' [Citation.] The material terms of a loan include the identity of the lender and borrower, the amount of the loan, and the terms for repayment." (*Peterson Development Co. v. Torrey Pines Bank* (1991) 233 Cal.App.3d 103, 115; 12 Miller & Starr, Cal. Real Estate, *supra,* § 36:4, p. 10 ["The material terms of a loan are the identity of the lender and borrower, the amount of the loan, and the terms of repayment. Other matters such as interest rate, which may be established by the marketplace or the lender's other lending practices, and provisions for security and insurance, may be established by custom and practice"].) In *Laks v. Coast Fed. Sav. & Loan Assn*. (1976) 60 Cal.App.3d 885, 891, the court identified additional material terms including "payment schedules for each loan, identification of the security, prepayment conditions, terms for interest calculations, loan disbursement procedures, and rights and remedies of the parties in case of default." The court noted, however, that "[n]one of these, standing alone, would necessarily make the offer conditional if missing," but "the fact that so many important conditions are absent, . . . emphasizes the conditional nature of the letter and strengthens the argument that the parties were still in the negotiation stage." (*Ibid*.)

Here, the second amended complaint alleges that on March 10, 2007, Countrywide's agent sent plaintiffs an email confirming the terms of two proposed loans

totaling $3.2 million. The first was a "Pay Option" Adjustable Rate Mortgage for $2.2 million, indexed to the Monthly Treasury Average (MTA) with a start rate of 2 percent and a 3.875 margin. The initial minimum payment was to be $7,392.39. The cost for obtaining the loan was .5 points and there was a one-year prepayment penalty. The second loan for $1 million was a "30/15 fixed rate" mortgage with a 7.875 percent interest rate, no points and a five-year prepayment penalty. The monthly payment on this loan was to be $7,250.29. Three days later, the complaint alleges, the agent sent another email advising that "underwriting" had approved the loans and that "all that needed to be done was payment of $100 to 'lock in' the loans" and that Michael paid the $100. Then, on April 8, the agent sent Michael a further email reading: "It's been approved with a .50 discount point add on ($11,000 cost). [¶] So, 1st loan amount is $2,2000,000. 2nd is $1,000,000." While the final April 8 email considered by itself did not include all of the essential terms, taking the exchange of emails as a whole, the critical terms were stated explicitly. The "it" that the April 8 email said was approved was, so far as the pleading indicates, the loan package specified in the earlier emails.

There was no question, according to the allegations of the amended complaint, as to the identity of the parties, the amounts of the two loans, the terms of repayment,[3] or to several of the other specifics mentioned in *Laks v. Coast Fed. Sav. & Loan Assn.*, *supra*, 60 Cal.App.3d 885. While the emails did not contain many of the provisions to be anticipated in final loan documents, such as the penalty for late payments and provisions concerning default and enforcement of the note, these terms can be implied from industry custom and the terms of the parties' existing loan agreements. Their absence does not mandate the conclusion that the parties failed to agree upon the essential provisions of the refinancing. (E.g., *Fischer v. First Internat. Bank* (2003) 109 Cal.App.4th 1433, 1447-1448; *Teachers Ins. & Annuity Asso. v. Tribune Co.* (S.D.N.Y. 1987) 670 F.Supp. 491, 501-502; *Wait v. First Midwest Bank/Danville* (Ill.App. 1986) 142 Ill.App.3d 703, 708-

[3] Although the March 10, 2007 email did not state explicitly the term of the adjustable rate mortgage, given the initial interest rate and the initial monthly payment, which were stated explicitly, the term of the loan can be calculated.

709; *Bixler v. First Nat'l. Bank* (Or.App. 1980) 49 Or.App. 195, 199; *Bluevack, Inc. v. Walter E. Heller & Co.* (Fla.App. 1976) 331 So.2d 359, 360; cf. *Sterling v. Taylor* (2007) 40 Cal.4th 757, 766; *In re Marriage of Benson* (2005) 36 Cal.4th 1096, 1108.)

Accordingly, the trial court erred in sustaining Countrywide's demurrer with respect to the contract-related causes of action.

D. *Fraud Claims*

The first amended complaint alleges causes of action for intentional misrepresentation (second cause of action), negligent misrepresentation (third cause of action), unjust enrichment (fourth cause of action) and promise without the intent to perform (fifth cause of action) arising out of Countrywide's alleged misrepresentations to the Querards that it would refinance their home at 80 percent of the $4 million appraised value, the refinance would be completed expeditiously and late payments on the current loans would not be reported to the credit reporting agencies. The complaint alleges that "as a result of its improper failure to close, Countrywide reported plaintiffs' late payments to credit reporting agencies which repeatedly decreased plaintiffs' credit scores, which prevented plaintiffs from accomplishing a refinancing with any other lender." Plaintiffs allege that they "have been damaged, in that: (a) they have lost title to their property; (b) their credit scores and credit have been damaged; (c) other investment properties have been lost and/or threatened; [and] (d) they face eviction from their family residence."The trial court sustained the demurrer to these claims on the ground that "[p]laintiffs' allegations do not establish the foreclosure damages were proximately caused by defendants' alleged misrepresentation or alleged promissory fraud." [¶] . . . [¶] Plaintiffs' own pleading established that the first and second loans from Countrywide ($2.71 million[4]), together with the charges for property tax ($24,000) and closing costs ($30,000) could be retired with the $3 million refinancing ultimately offered by

[4] The trial court's order states that the outstanding loans amount to $2.17 million. The parties agree that the proper amount is $2.71 million.

defendants. This sum would avoid defendants' foreclosure and trustee's sale of the deed of trusts had plaintiffs only agreed to accept this final offer."

Plaintiffs dispute the trial court's premise that accepting the $3 million loan would have prevented the foreclosure and resulting damages. They point out that the first amended complaint alleges that there were two additional mortgages on the property held by a different bank and assert that the $3 million loan offered by Countrywide would have left them $54,000 short of the amount needed to refinance all four loans. Plaintiffs assert that they would not have been able to continue making payments on the third and fourth mortgages if they had received the proposed $3 million loan and refinanced only the first two loans. Although, as Countrywide contends, the allegations of the of the first amended complaint are not as clear as they might be, they nonetheless are entirely consistent with plaintiffs' theory. The first amended complaint alleges that "[i]n addition to the purchase of their family residence at issue herein, plaintiffs owned investment property located primarily in Marin and Napa Counties. During this time, Michael was an active and full time real estate investor. As an integral element of that real estate business, Michael scrutinized the real estate market and its ability to assimilate the properties which plaintiffs bought, repaired and sold into the market. As part of that function, commencing in approximately August 2005, Michael noted the changing Bay Area real estate market and realized the necessity of reworking his real estate financing. [¶] Plaintiffs realized that due to the softening market in late 2005 plaintiffs would need to raise additional capital to cover the costs of servicing and completing their real estate projects and presenting them into the market at a reasonably advantageous time." Further, the amount that Countrywide offered to loan plaintiffs "was insufficient to pay off the four loans against the property, much less provide working capital to sustain plaintiffs." The pleading then specifies the amounts needed to pay each of plaintiffs' obligations, totaling $3.054 million. Plaintiffs argue that even if the loan ultimately offered by Countrywide could have avoided the foreclosure, it was not sufficient to have prevented the damage to their other investment property alleged in the complaint. While the trial court might have been justified in requiring some additional specificity with respect to

these allegations, there is no basis for concluding, as a matter of law, that Countrywide's refusal to loan plaintiffs the full amount it allegedly had committed to loan did not give rise to any damages. The court erred in sustaining general demurrers to these causes of action, compounded by the failure to permit plaintiffs to amend to provide such further specificity as the court may have considered necessary.[5]

Disposition

The judgment dismissing the action is reversed. The matter is remanded with directions that the trial court vacate its orders sustaining Countrywide's general demurrers to the first, second and third causes of action of the second amended complaint and to the second, third, fourth and fifth causes of action of the first amended complaint. The order sustaining without leave to amend the general demurrer to the seventh, tenth and eleventh causes of action of the first amended complaint is affirmed. The orders sustaining Countrywide's demurrers to other causes of action not challenged on appeal are also affirmed. Nothing herein precludes the trial court, on its own motion or motion of the parties, from authorizing or requiring the filing of a further amended complaint to clarify the allegations of the surviving causes of action consistent with this opinion. The parties shall bear their respective costs on appeal.

_____
Pollak, J.

We concur:

_____
McGuiness, P. J.

_____
Siggins, J.

[5] In view of this determination it is unnecessary to consider plaintiffs' additional argument that they should be granted leave to amend to allege additional causes of action not presented in the trial court.